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IN THE

Supreme Court of the United States

No. 347, October Term, 1969

DAVID G. CAIN, ET AL.----------APPELLANTS

V.

COMMONWEALTH OF KENTUCKY----------APPELLEE

MOTION TO DISMISS AND/OR AFFIRM

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Supreme Court of the United States

No. 347, October Term, 1969

DAVID G. CAIN, ET AL. ..... *Appellants*

V.

COMMONWEALTH OF KENTUCKY ..... *Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that the appeal be disinissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this motion states:

1. The opinion of the Kentucky Court of Appeals, reported in 437 S.W. 2d 769, sets forth five grounds asserted for reversal upon appeal. Two of these grounds involved an attack upon the constitutionality or validity of the state obscenity statute, KRS 436.101. The state appellate court noted that any other grounds which could have been raised were not presented on appeal and were therefore waived.

2. Appellants seek to present to this Court the question of the manner in which police officers seized the print of the film, contending that it was unconstitutional to seize it without an initial adversary proceeding under judicial supervision to determine its obscenity, whereby the convictions must be reversed. This question was not raised or argued before the Kentucky

Court of Appeals and was not passed upon. It cannot, therefore, be considered by this Court upon appeal from the judgment of the highest court of Kentucky. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940); *State Farm Mutual Ins. Co. v. Dyel*, 324 U.S. 154 (1945).

3. Appellants did not raise the question of unconstitutional seizure of the film in the trial court. Neither the motions to dismiss the indictment filed on June 14, 1967 and August 3, 1967, nor the motion for a new trial filed on August 15, 1967, raised any question about the legality of the seizure of the film. No objections were made during the trial to the admission of evidence of the film on the ground that it had been unconstitutionally seized. No preliminary motion to suppress the evidence prior to trial was made. It is believed that it would have been possible under Kentucky procedure for appellants to have made a motion following seizure of the film for return of the film, coupled with a request for a judicial hearing and determination of whether or not the film was constitutionally protected as non-obscene. But this was not attempted. This Court is without power to decide whether constitutional rights have been violated when the Federal question was not seasonably raised in accordance with state law. *Edelman v. California*, 344 U.S. 357 (1953).

4. The attack upon the constitutionality of the statute in the Kentucky Court of Appeals was based on two grounds, which were: (a) that this Court in *Redrup v. New York*, 386 U.S. 767 (1967), limited state control in the area of obscenity to juveniles, invasion of privacy, and pandering, whereby the Kentucky statute could not constitutionally be applied to the theater manager in this case; and (b) that the statute contains a constitutionally defective definition of obscenity. It is apparent from the opinion of the Court of Appeals in *Cain v. Commonwealth*, Ky., 437 S.W. 2d 769 (1969), that these questions were correctly resolved in favor of the constitutionality of the statute. The Kentucky statute was enacted in 1966 and is a "model law" pat-

terned after the American Law Institute Model Penal Code drafts on obscenity. The A.L.I. Model Penal Code has been cited repeatedly with approval by this Court in its majority opinions.

5. The construction placed upon the Kentucky statute by the Court of Appeals regarding the element of scienter is reasonable and accords with constitutional requirements. This Court has held that actual subjective knowledge is not necessary and that a standard of reckless conduct in trafficking in material meets constitutional requirements. *Mishkin v. New York*, 383 U.S. 502 (1966). All that is constitutionally required is an awareness of the contents of the material and that it is of obscene character or nature.

6. The film "I, A Woman" was found to be obscene by a Kentucky jury representing a cross-section of the community. It is significant that the determination of the factual question of obscenity was made by a jury and does not represent merely the opinion of a judge or court. However, the Kentucky Court of Appeals also stated in 137 S.W. 2d 769 at 775:

> "... It is our opinion that the jury had sufficient evidence before it to hold the film obscene. There can be no doubt but what it is without any redeeming social value whatsoever; that it appeals to the prurient interests and that it deals exclusively with sex. For these reasons we are of the opinion that it is not entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States."

WHEREFORE, the appeal should be dismissed, or in the alternative the judgment of the Kentucky Court of Appeals should be affirmed on the ground that of the two questions set out in the Jurisdictional Statement, one was not presented to or passed upon by the highest court (or by any court) of the state, and the elements of the other question as to the con-

stitutionality of the statute were clearly decided correctly by the state appellate court.

Respectfully submitted,

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